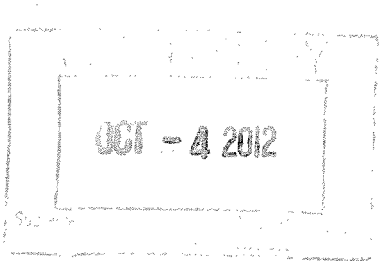
10-4-2012

In re Driver's License Suspension of Besaw Appellant's Reply Brief Dckt. 39759

IN THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE J. BESAW , JR.,	)	
	)	
Appellant/Petitioner,	)	Docket Number 39759-2012
	)	
vs.	)	
	)	
State of Idaho,	)	
Department of Transportation,	)	
	)	
Respondent.	)	



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce regarding a judicial review of an ALS hearing officer decision.

The Honorable Chief Justice and Associate Justices of the Idaho Supreme Court

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COMES NOW the Appellant, George Besaw Jr., by and through his attorney of record, CHARLES M. STROSCHEIN of the law firm of Clark and Feeney, and responds to the State's brief.

I.
Argument

A.
MR. BESAW HAS MET HIS BURDEN TO SHOW THAT THE EVIDENTIARY TEST FOR BREATH ALCOHOL CONTENT DID NOT COMPLY WITH IDAHO CODE SECTION 18-8004(4)

The State did not deny in it's responding brief that the SOP and "breath testing standards" were changed as a result of the emails that were made part of this record. R. at pp. 117-164. The emails begin with the Notice of Action on Public Record Request, in which the Idaho State police responded to a Freedom of Information Request regarding why the changes were made to the SOP. R. at p. 117.

Idaho Code Section 18-8002A(7)(d) specifically notes as grounds for vacating the license suspension: "The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4) Idaho Code ...".

The State does not address Wheeler v. Idaho Transportation Department, 148 Idaho 378, 223 P.3d 761 (Ct. App. 2009). Judge Lansing specifically indicated that if the standards were not mandatory, then they could not be any sort of standard at all. In addition, the State fails to address the holding in State v. Bell, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1998) and its analysis of Idaho Code Section 18-8004(4).

The State's basic position is that ISP can set anything as a standard, and the courts and drivers in the State have to accept this position. The State's position is that ISP could issue a single page, one sentence standard saying that "Whatever ISPFS says goes. Trust us, we're the police." End of standard.

The Court can look at the August 20, 2010, SOP's Scope Section. A copy of this SOP was attached to the Respondent's Brief. See attached Exhibit A, page 7 of 17, for the court's ease of reference. The scope section states: "Following all the **recommendations** of this external procedure will establish the scientific validity and set the **unquestioned** foundational admissibility of the breath alcohol test." (emphasis added) ISPFS decided that what it says is unquestionable despite what all the case law holds regarding what a driver can challenge. Please note all the deletions that occurred to the SOP on August 27, 2010, just a scant seven days after the new SOP was put into effect[1]. R. at p. 775

The November 1, 2010, SOP under "Scope" sets out: "Following all the **recommendations** of this external procedure will establish the **scientific** validity of the breath alcohol test. Failure to meet all the recommendations within this procedure does not disqualify the breath test." (emphasis added) The ISPFS has determined that the SOP is just a recommendation that can be explained away by some BTS. The State does not explain why there was a need for changes to the SOP and the long standing use of BTS manuals as standards. The State does not cite to any case law in it's responsive brief regarding this issue.

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[1] The SOP states: "Deletions and/or additions to section 2, 4.3.3, 4.4.1, 4.4.3, 4.4.5, 4.6.1.1, 5.1.2, 5.1.4, 5.1.4.1, 5.1.5, 5.2.4, 5.2.5, 6, 6.2.1, 6.2.3, 6.2.4, 7, 7.1, 7.1.1, 7.1.2, 7.1.2.2, 7.1.3, 7.1.4, 7.1.5, 8." R. at p. 775.

In Masterson v. Idaho Department of Transportation, 150 Idaho 126, 244 P.3d 625 (Ct. App. 2010), the Court looked at the Intoxilyzer 5000 and 5000EN manuals and noted the internal parts and technology utilized by the two instruments were different. The Court used the Intoxilyzer 5000 and 5000EN manuals as a part of it's analysis of standards while noting the inconsistencies between the SOP and the manuals.

In Hubbard v. Department of Transportation, 152 Id. 879, 276 P.3d 751 (Ct. App. 2012), the Court quoted Gibbar v. State of Idaho, Department of Transportation, 143 Id. 937, 155 P.3d 1176, (Ct. App. 2006):

> "In Gibbar, we interpreted Idaho Code Section 18-8002A(7)(c) and (d) 'as pertaining (administrative license suspensions) petitioners to challenge the results of their BAC tests by proving that the testing equipment was inaccurate or was not functioning properly because the State has adopted procedures that do not ensure accuracy and property functioning.' Gibbar, 143 Id. at 947, 155 P.3d at 1186."

At p. 755.

The Court went on to note that in State v. Hartwig, 112 Id. 370, 732 P.2d 339 (Ct. App. 1987), the reliability and performance of the machine is still subject to challenge. Prior to August 20, 2010, the "standards" included the BTS Manual and SOP. The BTS manual had different sections that dealt with the programming and functioning of the machine, and the training of the operators in the maintenance and the operation of breath testing devices. R. at p. 811-904.

The SOP Subsection 6.2 dated August 20, 2010, states:

> "**A complete breath alcohol test includes two (2)** valid breath samples taken during the testing sequence and proceeded by air blanks. The duplicate breath samples should be approximately two minutes apart to allow for the dissipation of potential mouth alcohol contamination." (emphasis original)

Now examined the SOP's 6.2 dated November 1, 2010, which states:

> "**A complete breath test includes two (2)** valid breath samples taken during the testing sequence and proceeded by air blanks. The duplicate breath samples should be approximately two minutes apart, or more, for the ASIII and the CS20 to allow for the dissipation of potential mouth alcohol contamination." (emphasis original)

The State cites to Footnote 3, p. 14 of Mr. Besaw's Appellate Brief in it's Footnote 3 Respondent's Brief at p.8[2]. There is a difference with a distinction between these two SOPs and the language noted. The e-mail generated by Eric Moody to Mr Gammette on September 2, 2010, notes that during oral argument, two attorneys argued the two minute separation between two breath test results (SOP 6.2) do not occur with the Intoxilyzer 5000EN. R. at p. 139. Mr. Moody follows up and notes that the Intoxilyzer 5000EN does not have this two minute wait period but the Alcosensor III and the Lifeloc FC 20 do. R. at p. 139. He inquiries as to whether this SOP 6.2 only deals with the Alcosensor III and the Lifeloc FC 20 but not the Intoxilyzer 5000.

As of August 20, 2010, there would not have been one Intoxilyzer 5000 or one Intoxilyzer 5000EN in the State of Idaho that complied with the two minute wait period because the machines are not programmed for the two minute wait.

In November of 2010, ISPFS added the language regarding the Alcosensor III and the Lifeloc FC 20 to Section 6.2 because that is the way these machines are programmed. These machines are programmed for the two minute wait because that is what the international and national standards are for breath testing. The International Organization of Legal Metrology (OIML) is a worldwide, intergovernmental organization whose primary aim is to harmonize regulation and metrological

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[2] Respondent's Brief, Footnote 3 states:
"See for example FN 3 page 14 of Mr. Besaw's Appellate Brief comparing the August 20, 2010 Standard Operating Procedure 6.2 with the November 1, 2010, Standard Operating Procedure 6.2, where the only difference is the elimination of the names of the breath testing devices, a difference without a distinction."

controls applied by national metrological services or related organizations of its member states such as the United States of America. The United States organization is the National Safety Council on alcohol and other drugs. Both organizations endorse a minimum of two samples taken not less than two or more than ten minutes apart. This standard is cited by Dubowski on p. 310 of his article, K.M. Dubowski, "Quality Assurance in Breath Alcohol Analysis." Journal of Analytical Toxicology, Volume 18: pp. 306-311 (1994). The State's idea of a difference without a "distinction" is not borne out by the science involved in breath testing.

The State does not address exactly what scientific standards are. The State does not address if a scientific standard can be discretionary. Judge Lansing did not seem to think so in her opinion in Wheeler v. Idaho Transportation Department, 148 Id. 378, 223 P.3d, 761 (Ct. App. 2009). The State does not explain exactly how the standard regarding the 15 minute observation period went from a mandatary monitoring period to a discretionary monitoring period, from "must" to "should".

The State also does not cite to In Re Schroeder, 147 Id. 476, 210 P.3d 584 (Ct. App. 2009). This is the case that probably started ISP's journey to it's current SOP. The Court in In Re Schroeder specifically noted that the SOP and the Intoxilyzer 5000 manual were in conflict with respect to the circumstances in which the monitoring period must be restarted. The Court indicated that the more specific Intoxilyzer 5000 manual governed because it was more specific. The Court stated:

> "Here, the SOP is more general, for it applies to various breath testing devices approved by the ISP, whereas the Intoxilyzer 5000 manual is written exclusively for that instrument and is therefore less likely to have been written in a way that might sacrifice specific detail for broad applicability."

At p. 480.

One of the e-mail generated by Matthew Gammette to chiefs, sheriffs, prosecutors, breath testing specialists and breath instrument operators specifically noted:

> "The Idaho Standard Operating Procedure (SOP) contains the method to follow in general. This manual has been revised and updated.
>
> The 'training manuals' have been replaced by 'reference manuals.' Each instrument series has a reference manual. **We found that in a number of cases the training manual and the SOP had conflicting information and the courts were deciding which manual to use for interpretation**. In the revised manuals we have made it very clear that the SOP is the document that should be referenced and the reference manuals are really for the BTS or operator reference when working with the instrument menus. We have tried to take out any conflicting wording. If we have missed something, please let us know. The BTS and operators should be very familiar with the SOP." (emphasis added) (underlining original)

R. at p. 139.

Because of the Schroeder case, ISPFS has dumbed down the standards to something that is not based on "specific detail" and are just recommendations. There is no indication that there was any scientific peer review of these new SOPs. The SOP does not meet the requirements of the legislative history Judge Lansing noted in State v. Turbyfill, 2012 Opinion No. 51, footnote 2.

ISPFS has violated the mandate from the legislature. ISPFS has simply made the breath testing system so pliable that there are no standards that ISPFS cannot over come by sending Jeremy Johnston or some breath testing specialist into to testify. Why exactly is Mr. Gammette asking chiefs of police, sheriffs, and prosecutors for input in developing "scientific standards" for breath testing in the State of Idaho? The State in it's responding brief does not answer why these non-scientists were asked about setting scientific standards in the new SOP.

The State indicates in it's brief that Mr. Besaw did not present any sort of scientist at the administrative hearing. It does not take a scientist to figure out that discretionary language and "wiggle" words and vagueness do not amount to scientific standards that should be relied on by the courts. The Court can also note another e-mail sent from Matthew Gammette to chiefs of police,

prosecutors and other "stakeholders" in which he notes that on August 27, 2010, ISPFS published a revision 1 of the Idaho Breath Testing SOP. He notes the release of revision 0 gave ISPFS the opportunity to hear from prosecutors, etc., regarding the SOP. He thanks them for their comments and notes that ISPFS is doing some "legal research" regarding sections of the SOP. R. at p. 138. Why exactly are scientific standards being developed based on legal research? The legislature passed I.C. § 18-8004(4) requiring valid methods of breath testing. ISPFS has made rules that weaken the breath testing standards so much that basically if the police get a result, it is admissible. Therefore, ISPFS has taken this delegation of authority to an unconstitutional level.

If the Court upholds ISPFS's actions with regard to breath testing "standards" in this state, then the Court can only assume that ISPFS will continue to dumb down the standards until there is just a single page SOP that says "What ISPFS say goes. Trust us, we're the police."

B.
THE PERFORMANCE VERIFICATION OF THE LIFELOC FC20 WAS NOT SUFFICIENT AS IT DID NOT COMPLY WITH THE REQUIREMENTS OF THE SOP

The State in it's briefing cites only to certain subsections of the November 1, 2010, SOP to support its position, but as the Court is aware, the SOP must be read as a whole to get the full understanding of the 0.20 solution performance verification requirements. In this record, the e-mails that were generated by the ISPFS discuss linearity. These e-mails also discuss the need for the 0.20 solution with regard to 0.20 blows. Jeremy Johnston, the head of the breath testing in the State of Idaho wrote:

> "As for the 0.20 requirement, I'm suggesting not dropping it altogether, I am just suggesting putting in some **wiggle room language** so that in the event that the 0.20 is not run in a calendar month, the prosecution only loses the enhanced penalty charge that the 0.20 checks supports and not the entire DUI charge. DUI's deals with thresholds and for regular DUI, the threshold is 0.08. It (sic) the proper cal checks are in place to support that charge, then

> the charge should be valid. The person that blows a 0.14/0.15 should not get off on a technicality because the BTS failed to run a cal check to support a charge that is not pending for that case. After all, a year and a half ago, the 0.20 check wasn't even required and the prosecution had no problems at all until they got above the 0.20 threshold for the enhanced penalty. That was the reasoning behind instituting the 0.20 check in the first place. **Cases are currently being tossed because of this.** It seems like it is a disservice to the state of idaho to continue to keep that loophole open." (emphasis added)

R. at p. 148.

Please note Mr. Johnston's use of the term "wiggle room language" in how he looks at developing the SOP. David Laycock participated in the discussion regarding the 0.20 solution. He wrote:

> "Why do we want to go backwards? I didn't say there was not testing to show it looses alcohol just sitting there; I don't know. What happens if the simulator is on 24/7 but no tests are run? **I don't think this is the time to cut back on quality standards.** JJ, you mentioned the cases that were getting dismissed because agencies weren't running the 0.20. They could easily cure the problem simply by spending 30 minutes per month in complying with the SOP. They could even save the 0.20 and use it the next month, maybe two. **Face it, most agencies would probably be happy if the SOP were trimmed down to 2 or 3 pages total.**"

R. at p. 149.

Isn't this last sentence about a two or three page SOP telling, and this coming from one of the employees of the ISPFS? For the State, less is more. For the drivers of Idaho, less is not more. Less violates scientific principles and due process. Please note that David Laycock cites to Dubowski as a resource for breath testing in the State of Idaho. R. at p. 149. In addition, the Court should note that there are cases from other parts of the country that deal with linearity in breath testing at different intoxication levels. See State v. Holland, 27 A.3d. 1212 (App. Div. N.J. 2011).

Jeremy Johnston says in an e-mail dated February 26, 2008:

> "Afterall (sic), we only really care about the instruments linearity, at the

upper levels, when we had a case with results at or above the upper 0.20 level. In which case, they didn't run the 0.20 check, the linearity isn't really in question because they would be using the 0.08 check and threshold for prosecution. Personally, I think that 'in support of the excessive consumption charge' actually covers both bases without being overly analytical in the SOP. Do we care if the instrument is linear at the 0.20 if the breath sample is below the 0.20 level? As long as it is above the .08, our bases are covered.

P.S. I think that is where we are getting lost in the translation. **It is good scientific practice to check linearity because that lends credence to the accuracy of the numbers that the instrument generates.** What is different with the BTS program is that we only need to know the accuracy of the numbers at the legally relevant thresholds. The numbers in between are irrelevant as long as they can be proven to be above the threshold that is being charged (excessive or not)."

R. at p. 151.

Then Darren Jewkes states on February 25, 2008 the following:

"In addition to running a 0.20 check for excessive consumption, it should also be run to demonstrate the linearity of the instrument. If we stated as policy that the 0.20 checks only support excessive consumption than agencies are more likely to skip this check on a regular basis."

R. at p. 151.

Jeremy Johnston on February 25, 2008, states:

"It absolutely would because the **'must' would be replaced with a 'should'** in the case of an enhanced penalty situation. We could even change it to read that the 0.20 should be run once and (sic) month, and **must be run to support an enhanced penalty charge.** Then we have the best of both worlds. No enhanced charge without the 0.20, but if they don't run it, they can still charge regular DUI." (emphasis added)

R. at p. 152.

A few minute before the above noted e-mail, Jeremy Johnston writes:

"Correct, I'm just trying to close a loophole with the 0.20 and the 'must' language that is being used by defense in the ALS to say that the instrument that was used wasn't properly usable because the 0.20 check wasn't

performed according to the SOP."

R. at p. 152.

The SOP is being changed based on what is happening with ALS hearings and DUI cases, not what is scientifically acceptable. These e-mails are simply discussions about what makes things easier to prosecute DUIs and get ALS suspensions upheld. R. at p. 153.

The State's brief fails to set out the complete SOP language regarding performance verification of breath testing instruments. The following is found in the SOP that took effect on November 1, 2010:

"**5. Performance Verification of Breath Testing Instrument**

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the verification and includes the acceptable values may be different from those show on the bottle label.

5.1 Alco-Sensor and Lifeloc fc20-Portable Breath Testing Instrument Performance Verification

5.1.1 The Alco-Senso and Lifeloc FC20 portable breath testing instrument performance verification is **run using approximately 0.08 and/or 0.20 performance verification solutions** provided by and/or approved by ISPFS.

5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples.

5.1.3 **A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 or 0.20 performance verification solution must be performed within 24 hours,** before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification. **Reference 5.1.4.1 for clarification on the use of the 0.20 solution in this capacity**.

5.1.3.1 A 0.08 performance verification solution should be replaced with fresh solution approximately every 25 verifications or every calendar month, whichever come first.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first.

NOTE: The 0.20 performance verification was implemented for the sole purpose of supporting the instruments's results for an 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate tests performed that yield results at other levers or in charges other than 18-8004C.

5.1.4.1 **The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test at any level. The 0.20 performance verification solution should not be used routinely for this purpose**." (emphasis added)

R. at p. 307

The State in it's briefing does not explain why ISPFS placed the word "approximately" in 5.1.1 and why in 5.1.1 there is the phrase "and/or". This language is not consistent with 5.1.3 where just the word "or" is used in reference to the 0.08 and 0.20 solution. **The SOP does not state that a 0.08 performance verification satisfies the requirement for an excessive breath test.** This point is consistent with the e-mails noted above. The SOP specifically indicates that a 0.20 performance verification satisfies the requirement for performance verification within 24 hours at any evidentiary test level. SOP 5.1.4.1. The highlighted language above must mean something. The hearing officer and the District Court and the State all want to read something into the SOP which is simply not there. The reason that the Department uses a 0.08 and a 0.20 solution is for the benefit of linearity. Linearity is for the benefit of testing an unknown sample (the driver's breath) against

a known sample which is the performance verification solution. Section 5.1.4 is just an additional provision for a monthly 0.20 solution calibration and has nothing to do with the actual breath sample testing with a driver.

Henry's Law, which is the scientific law that these breath testing machines are based on supports Mr. Besaw's argument regarding breath testing in this particular circumstance. Henry's Law describes the mechanism of exchange in the lungs which is influenced by physiological factors. Henry's Law directly explains the volume of alcohol in the simulator's vapor. Henry's Law states that in an enclosed system, at any given temperature, the concentration of a volatile substance in the air above a fluid is proportional to the concentration of the volatile substance in the fluid. In this circumstance, the breath sample is unknown while the liquid solution is known and therefore the language and meaning of the SOP supports Mr. Besaw's argument.

The hearing officer notes: "Further the Standard Operating Procedure does allow for 0.08 performance verification check to be run to support a blow in excess of 0.200." R. at p. 218. The hearing officer does not cite to anything in the SOP that supports this statement.

Why exactly would the ISPFS note anything about performance verifications using a 0.20 within 24 hours if in fact it never had to be used with breath samples? Why make any reference to 0.20 at all for the 24 hour performance verification? Why not simply say a 0.08 solution applies in all circumstances. The State's position flies in the face of the idea of linearity and the whole reason for multiple solutions levels (i.e. 0.04; 0.08; 0.20) used in performance verification.

Just the words themselves "performance verification" support Mr. Besaw's position. When there is a solution change at the beginning or end of the month, there is no "verification" to be made because there is no breath sample to be tested. There is a calibration of the machine to make sure

that it registers correctly a 0.08 and 0.20 but there is no "performance" being verified. If in fact the performance verification using a 0.20 solution was not required for excessive tests, why put extra language in the SOP that just causes confusion? If nothing else, this SOP could be considered vague which does not meet the "standard" requirements of I.C. § 18-8004(4).

Mr. Besaw has met his burden with regard to the failure of the operator to do a performance verification within 24 hours using the 0.20 solution with breath samples that were in excess of 0.20.

C.
THE 15 MINUTE OBSERVATION PERIOD DID NOT COMPLY WITH THE REQUIREMENTS OF THE SOP

At 02:31:01 on Exhibit K, Mr. Besaw was specifically noted as being arrested by the ISP officer. The start of the ALS advisory was at 02:37:15 and it ended at 02:40:10 based on the audio/video that is part of this record as Exhibit K. Mr. Besaw inquires at 02:40:13 about his Class A driver's license and the trooper provided misinformation at 02:40:16 regarding this issue. In the State's brief, it cites to the trooper starting his observation at period at "36:45" and that the breath test was administered at "52:30". Respondent's Brief at p. 13.

The State says that the hearing officer relied on the affidavit filed by the arresting officer. The majority of the affidavit is boilerplate language. The arresting officer's probable cause statement is: "After listening to the ALS advisory and after the mandatory fifteen minute waiting period, Besaw Jr. provided three breath samples on the Lifeloc FC20. The results with .219 insufficient and .201 BRAC." R. at p. 75. There is boilerplate language on this affidavit that states as follows: "Defendant was tested for alcohol concentrations, drugs or other intoxicating substances. The test(s) was/were performed in compliance with Section 18-8003 and 18-8004(4) Idaho Code and the standards and methods adopted by the **Department of Law Enforcement**." (emphasis added)

R. at p. 75. There is no longer a Department of Law Enforcement so this boilerplate language is not helpful in the analysis of whether the arresting officer complied with the requirements of I.C. § 18-8002A, I.C. § 18-8004(4) and the standards and methods of ISPFS.

In Exhibit K, the trooper did not bother to turn on the video in the backseat until after Mr. Besaw's breath test was completed. The hearing officer and the District Court simply disregarded all of the contacts that were made and the common sense that applies to this sort of circumstance. If a trooper is talking to other law enforcement officers, passengers or people that arrive later, his focus and senses are going to be on those individuals and not on someone who is sitting below his eyesight with handcuffs inside the vehicle. This is not a circumstance where Mr. Besaw's feet were outside the vehicle and he was facing towards the outside of the car. According to the trooper, he was seated in the vehicle with his feet forward. R. at p. 307, ll. 15-23, ALS Hearing T. at p. 22.

The Court can review the Respondent's Brief and it's cite to the SOP. Respondent's Brief at p. 15. The State notes that there are certain things that the officer should do with regard to evidentiary testing. In fact, the State felt it necessary to underline the word "should" in reference to the "standards" of the SOP. One can only assume that the reason the State underlined "should" is to point out the fact that these are simply discretionary actions on the part of the operator of the breath device; that there is nothing mandatory about these particular sections of the SOP.

Mr Besaw's two breath samples are at the outer limit of the 0.02 collation factor. In addition, the Court can note the 0.08 performance verification checks that were noted on the log for January of 2011. R. at p. 73. Mr. Besaw's performance verification noted a .073/.073. The one done prior to that on January 6, 2011, noted a .072/.073 for solution lot #10802. For the simulator solution lot #10802, the State developed a Certificate of Approval setting the target range for the 0.08 solution. The target range for solution lot #10802 is ".072 to .088 grams of ethyl alcohol/210 liters of vapor".

Appendix A is the Certificate of Approval. The performance verification checks regarding this solution are at the lowest end of the range. Even the performance verification check done with the 0.08 solution on January 4, 2011, shows a .074/.075 solution test. One has to call into question the very solution that was used in this particular case. The solution results were not outside the range, but there is a question as to the viability of this particular solution lot. Combine this solution lot problem with the range of Mr. Besaw's breath sample and the Court can determine that the trooper failed to comply with the SOP §§ 6.1.4, 6.1.4.1. and 6.1.4.3[3]. The Court has to determine that under the circumstances something was missed by the arresting officer because of his distractions with the other police officers, the passenger, and the wife of the additional passenger who arrived on the scene prior to breath testing being completed. The officer could have video taped Mr. Besaw in the backseat during the blow sequence, and he choose not to. The officer could have gone to the Nez Perce County jail to have the breath test done in an enclosed environment; he choose not to.

Mr. Besaw does not have the burden to come forward and prove anything about burping, belching, or the like. He simply has to show that the 15 minute observation period was not complied with. The Court knows he was eating a hamburger shortly before breath testing was started, and he was drinking alcohol. Hamburgers and alcohol lead to gas in the stomach; this is just common sense.

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[3] The SOP states:

"6.1.4 During the monitoring period, the Operator must be alert for any event that might influence the accuracy of the breath alcohol test.

6.1.4.1 The Operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the Operator should being another 15-minute waiting period before repeating the testing sequence.

6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2."

R. at p. 784

Once again, there does not need to be a Homer Simpson type belch for there to be burping and the like in this sort of circumstance.

Mr. Besaw has a commercial driver's license. He was successful in his challenge to the CDL disqualification.

The Court should find that there was not a proper 15 minute observation period. With this Court's decision, the Court can instruct these officers to video the blow sequence when they have the capability and to take the drivers to an enclosed environment for the benefit of the driver and the observing officer. This is a case in which the Court can send a message to arresting officers that decide to do breath testing out in the field. Arresting officers can not talk to other law enforcement officers, they can not be distracted by passengers or other outsiders. The trooper in this case could have called for Lewiston Police Department back up since they did not want to leave him alone. Lewiston Police could have fended off passengers, wives of passengers and any other distraction. The Court should find that there was not a proper observation period and Mr. Besaw's license suspension should be vacated.

D.
MR. BESAW WAS NOT PROPERLY INFORMED OF THE CONSEQUENCES OF SUBMITTING TO EVIDENTIARY TESTING IN VIOLATION OF I.C. § 18-8002A(7)(e)

The State argues that Mr. Besaw is asking the Court to find that the trooper did not read him the entirety of the breath testing advisory and noted: "In spite of Mr. Besaw's argument, Trooper Talbott does not concur that he did not read the form properly." Respondent's Brief at p. 20. The Court can go back and review the trooper's testimony. R. at p. 308. The trooper indicated that he never reviewed the video at any time in it's entirety; the only thing that he reviewed was the video of the field sobriety tests. When asked questions about what he advised Mr. Besaw, the trooper

indicates: "I didn't review the video I don't know what I told him." R. at p. 308, ll. 24-25. Questions were asked about a CDL suspension not having a 90 day license suspension, the trooper indicated that he did not have a copy of the ALS form in front of him and he only has a general knowledge of the principles of the laws of the State of Idaho. He did state that he had been doing DUIs and reading these ALS forms since 2006. R. at p. 309.

Counsel played the audio portion of the video during the ALS hearing from his office over the phone for the trooper and hearing officer. R. at pp. 310-311. The trooper could not hear the audio over the phone. There was a discussion about the question regarding the CDL and the differences in suspensions. The trooper indicated that he did not really know what he said. R. at p. 311-312. This discussion followed:

> "Okay. And as far as your training goes, you're required to read the information that's set out in the suspension advisory section. Is that right?
>
> Answer: The middle section yeah, yes.
>
> Question: Okay, and if you didn't read all of that, then you violated your training with regard to advising them of all the information that's noted either in the refusal statute or the ALS statute?
>
> Answer: Yes, I have to read the middle section."

R. at p. 313, ll. 17-25.

There is nothing in the hearing transcript that points to the trooper disagreeing with the fact that he did not read the form properly. The audio speaks for itself. The trooper confirms that he gave incorrect information to Mr. Besaw. R. at p. 312, ll. 1-8.

The State fails to point to IDAPA Rule 39.02.72 regarding the rules governing ALS. Subsection 800 states:

> "**FORMS** the department shall develop approrpriate forms to be used

> throughout the state including, but not limited to, forms for the notice of suspension, temporary driving permit, and officers sworn statement. Each law enforcement agency **shall** use the forms supplied by the department **in carrying out the requirements of Section 18-8002A, Idaho Code, and this rule.** However, the sworn statement may be in the form of a law enforcement agency's affidavit of probable cause or equivalent documents so long it contains the elements required by Section 18-8002A, Idaho Code." (emphasis added)

R. at p. 371.

I.C. § 18-8002A(10) notes: "Rules. The department may adopt rules under the provisions of Chapter 52, Title 67 Idaho Code, deemed necessary to implement the provisions of this section." ITD complied with the adoption of IDAPA Rule 39.02.72.800 regarding Forms. The audio is clear that the trooper failed to read all of the middle section of the form. He did not read the last sentence which is found in bold, capital letters. R. at p. 70. ITD mandated what was to be read to comply with I.C. § 18-8002A. The trooper did not read everything mandated by ITD.

The State argues that Mr. Besaw has to show some prejudice and incorrectly relied on the trooper's mistake. The State does not point to any case law regarding this particular position. I.C. § 18-8002A does not indicate that there was to be prejudice, there just has to be an indication that the information was incorrect. Of course Mr. Besaw was prejudiced because he thought he had a 90-day license suspension if he took the breath test. He could have refused and the State would have had a much harder time in making a DUI stick without a breath test considering the circumstances in this case. The problems with the field sobriety tests are noted in the DUI appeal that is currently pending before the Court. (State v. Besaw, Docket No. 39874-2012, Idaho Supreme Court)

In State v. Valaro, 2012 WL 3176300 (Ct. App.), the Court, in dealing with an improper interrogation technique, stated: "As noted above, the police were allowed to make misrepresentations to illicit confessions; however, acceptance wains if the police misrepresents the law. See Divila 127

Id. at 892, 908 P.2d at 585." Opinion at p. 7. It is clear that Trooper Talbott misrepresented the law regarding the length of time for being without a CDL license as a result of taking a breath test.

E.
THERE IS NO DUE PROCESS IN ALS HEARINGS

The State does not comment on the ALS decisions that are part of this record. R. at pp. 594-749. The decisions were not issued in a timely fashion and some drivers won the ALS hearings but would have been suspended. See Exhibit B attached hereto noting relevant dates. These drivers would not have had the opportunity for any meaningful judicial review.

The State does not address any of the problems found so compelling in Bell v. ITD, 151 Id. 659, 262 P.3d. 1030 (2011). What the State says is: "Nor is there **any risk** that Mr. Besaw would suffer an erroneous disqualification of his driving privileges under the administrative license suspension procedure." Respondent's Brief at p. 21. (emphasis added) If Johnson v. ITD, 2012 WL 1949853, (Ct. App. March 2012), had been issued before Mr. Besaw's ALS matter, he would not have had the ability to get a stay from the District Court because there was no ALS decision. The State fails to address the fact that the hearing officer issued two orders denying stay noting that he would issue a decision in a timely fashion. One was issued before the temporary license ran and one was issued after. R. at p. 226 (February 11, 2011, order) and p. 201 (February 16, 2011, order). The ALS decision was not issued in a timely fashion. R. at p. 222 (Decision dated March 4, 2011) When the State says "Nor is there **any risk**", it flies in the face of the facts and the way these ALS matters are run. In Mr. Besaw's case, Counsel filed a Petition for Judicial Review and for stay prior to the hearing officer's decision. After the hearing officer's decision was entered, Mr. Besaw filed another request for stay and another Petition for Judicial Review. Mr. Besaw's situation is luckily not the same as the Johnson case from March of 2012.

Mr. Besaw has a interest in his driver's license that is quite substantial. The record in this case shows that there is a risk of erroneous deprivation of his driver's license through the current procedures used. Clearly, it would be easy enough to modify the procedure to note that the temporary license does not terminate until the hearing officer's decision is reached. The State of Washington uses this procedure. RCW §§ 46.25.125(6) and 46.20.308(8). The government's interest in changing this procedure is minimal and there is no administrative burden. In fact, extending the time frame for decisions and suspensions probably would be welcomed by the ALS hearing officers because they would have more time to issue decisions and not be overburdened with the few days they have from when the hearing is held until when the temporary license expires. In addition, as the Bell v. ITD, 151 Id. 659, 262 P.3d. 1030 (2011) court noted, the IDAPA Rules no longer require the 30 day period to get a hearing decision issued. IDAPA Section 39.02.72.600.01 has been removed. This is no explanation for this section's removal from IDAPA. There is no due process in this ALS process. The factors found in Matthews v. Eldridge, 424 US 319, 96 S.Ct. 893, 47 L.2d 18 (1976) are found in this case.

F.
THE STATE FAILED TO COMPLY WITH I.R.C.P. RULE 84

The State simply says that ITD did comply with Rule 84. I.R.C.P. Rule 84 makes it mandatory that the ALS record has to filed within 14 days of the Petition for Judicial Review filing date. The Department failed to comply with any of the aspects of I.R.C.P. Rule 84. R. at p. 59. It is interesting that the State seems to think that ITD's failure to comply with mandatory time frames should not have any consequence. A driver needs to have the issue of his driver's license suspension determined in a very timely and quick fashion. If the driver fails to request a hearing within seven days, his rights disappear to any sort of due process hearing. Wanner v. ITD, 150 Id. 164, 244 P.3d

1250 (2011). In Wanner, the driver failed to file his request for ALS hearing within seven days even though he did not have a Class D license. He had a Class A license. In Johnson v. ITD, 2012 WL 1949853, (Ct. App. March 2012), the Court indicated that Mr. Johnson made a request before a decision was actually reached. Again, another time factor that weighs against the driver.

Presently, the hearing officers do not have to issue decisions in any sort of timely manner. The hearing officers issue subpoenas that do not have any relevance to the time frame of the ALS hearing. ITD does not have to comply with mandatory Rules of Civil Procedure, but yet the driver has to comply with every mandatory time frame or he loses his due process rights. It seems like a one-sided system in favor of ITD. The poor citizen has to maneuver through all of these different statutes and rules to try to preserve his livelihood.

CONCLUSION

Mr. Besaw met his burden. The hearing officer failed to follow the statutory requirements. The District Court's decision upholding the hearing officer's decision was at fault. This matter should be remanded back to ITD with the proper instructions vacating the license suspension.

Mr. Besaw has tried to point out the flawed system used by ISPFS with regard to breath testing in the State of Idaho. The e-mails that are found in Mr. Besaw's record and the additional e-mails found in Mr. Besaw's DUI case (Docket No. 39874-2012, Idaho Supreme Court) show how ISPFS develop its "standards" for breath testing. These standards are not compliant with forensic science.

In Gibbar v. State of Idaho, Department of Transportation, 143 Id. 937, 155 P.3d 1176 (Ct. App. 2006), the Court criticized Mr. Gibbar's attorney for setting out his opinion regarding due process issues. The Court knows there is no discovery in ALS matters; the hearing officers issue

subpoenas that are not beneficial to the drivers as they subpoena items to be produced the day of, the day after, the day before, and potentially several days after the ALS hearing; the Court is aware that decisions are not issued in a timely fashion to protect post-suspension due process rights.

There was a recently published book by the Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council. Strengthening Forensic Science in the United States: A Path Forward (2009). This book was generated as a result of Congress directing the National Academy of Sciences to undertake a study regarding forensic science. Preface at p. xix. The book discusses: the fundamentals of scientific method as applies to forensic practice; falsifiability and replication and peer review of scientific publications; the assessment of forensic methods and technology; the collection and analysis of forensic data; and accuracy and error rates of forensic analysis. The report for Congress noted the lack of standards. There was no uniformity in certification of forensic practitioners or the accreditation of crime laboratories. At p. 6. The study by the Congressional Committee determined the need for requirements for measurement of error such as would be found in breath testing, noting that there are inherent limitation of the measurement technique. A range of factors are present and can affect the accuracy of laboratory analysis. Such factors may include deficiencies in the reference materials used in the analysis, equipment errors, environmental conditions that lay outside the range which the method was validated, sample mix ups and contamination, transcription errors and more.

The report noted that with regard to breath testing that there has to be a confidence interval for the range of breath testing that would supply a high probability of containing the true alcohol level. At p. 117.

The report also criticizes forensic science laboratories that are administered by law

enforcement agencies. The report notes the forensic laboratories should be independent or autonomous from law enforcement agencies. At pp. 183 - 184.

There is a specific notation regarding **standards** for quality control: "Standards provide the foundation against which performance, reliability, and validity can be accessed. Adherence to standards reduces biases, and proves consistency, and enhances the validity and reliability of results. Standards reduce variability resulting from idiosyncratic tendencies of the individual examiner." At p. 201.

The report also notes that there are many scientific organizations that have set standards. It cites to the National Institute of Standards and Technology (NIST). No where in this report to Congress is there any indication that standards are set by way of "wiggle room", "vagueness", and discretionary standards.

I.C. § 67-5279 allows the Court to vacate an agency finding if: there is a violation of constitution or statutory provisions: the agency acted in excess of statutory authority; the finding was based on an unlawful procedure; the actions were arbitrary, capricious or an abuse of discretion. In this case, ISPFS violated the mandate of the statutory provision of I.C. § 18-8004(4). The ISPFS did not have the authority to enter into a wholesale change of breath standards from mandatory to discretionary. The procedure used was improper, it was not based on scientific standards. The SOP was based on what ISPFS gleaned would help in DUI cases and ALS administrative hearings.

Please note that the Idaho Supreme Court has determined an action is capricious if it was done without a rational basis. In American Law Association of Idaho/Nevada v. State, 142 Id. 544, 130 P.3d 1082 (2006), the Court found it was arbitrary if the agency action was done in disregard of the facts and circumstances presented or without adequate determining principles. What was the

rational basis for making the SOP a discretionary document? There was a disregard of scientific principles, facts and circumstances making the current SOP arbitrary.

The e-mails noted in this case make it clear that ISPFS failed to comply with the mandate of I.C. § 18-8004(4). A substantial right of Mr. Besaw has been prejudiced, his ability to earn a living by way of his CDL driver's license. Of course, Mr. Besaw's case has a wider application to all drivers since the breath testing system is being challenged.

Building on Bell v. ITD, 151 Id. 659, 262 P.3d. 1030 (2011), Mr. Besaw has shown that ITD is more than willing to take a driver's license without due process. Mr. Besaw's decision was not issued within a timely manner, it was issued several days after his temporary driving privileges ended. The hearing officer was requested twice to grant a stay. In both Orders, he indicated that the decision would be reached before the temporary privileges expired, that did not happen. ITD has taken away the requirement to have a decision reached within 30 days as is noted in the Bell v. ITD, *supra*, case. In the Johnson case, the Court decided that a driver cannot ask for judicial review without a decision from the ALS hearing officer. There is absolutely no mechanism in the ALS process that allows for preserving the important right of a driver's license if a decision is not filed before the 30 day temporary license runs.

The advisory that was used in this case is contrary to Idaho case law and sets different standards for different types of drivers. Please vacate the license suspension for the sake of due process.

DATED this 8 day of October, 2012.

CLARK and FEENEY, LLP

By s/Charles M. Stroschein
Charles M. Stroschein, a member of the firm
Attorneys for Appellant

I hereby certify on the [illegible]
day of October, 2012, a true copy
of the foregoing instrument
was: ✓ Mailed
____ Faxed
____ Hand delivered to:

Edwin L. Litteneker
Special Deputy Attorney General
Idaho Transportation Department
P.O. Box 321
Lewiston, ID 83501

CLARK and FEENEY, LLP

[illegible]

By _____
Attorneys for Appellant

EXHIBIT A

Idaho Standard Operating Procedure

Breath Alcohol Testing

Idaho State Police
Forensic Services

Glossary

Approved Vendor: A source/provider/manufacturer of an approved premixed alcohol simulator solution shall be explicitly approved as a vendor of premixed alcohol simulator solutions for distribution within Idaho.

Breath Alcohol Test: A series of separate breath samples provided during a breath testing sequence.

Breath Alcohol Testing Sequence: A sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by either the instrument or the operator, but not both, and may consist of air blanks, performance verification, internal standard checks, and breath samples.

Breath Testing Specialist (BTS): An operator who has completed an advanced training class taught by an employee of the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month.

Certificate of Analysis: A certificate stating that the premixed ethyl alcohol solutions used for performance verification have been tested and approved for use by the ISPFS.

Certificate of Approval: A certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of an Idaho State Police Forensic Services Lab Manager, and the effective date of the instrument approval.

Changeover Class: A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument.

Evidentiary Test: A breath test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and community service or training tests performed with the instrument.

Idaho State Police Forensic Services (ISPFS): Formerly known as the Bureau of Forensic Services, the ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS is the administrative body for the breath alcohol testing program per IDAPA 11.03.01.

MIP/MIC: An abbreviation used to designate minor in possession or minor in consumption of alcohol.

Operator Certification: The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month.

Operator: An individual certified by the ISPFS as qualified by training to administer breath alcohol tests.

Operator Class: An ISPFS-approved training class for prospective or uncertified breath alcohol operators. Currently certified Breath Testing Specialists may teach operator classes.

Performance Verification: A verification of the accuracy of the breath testing instrument utilizing a simulator and a performance verification solution. Performance verification should be reported to three decimal places. While ISPFS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check."

Performance Verification Solution: A premixed ethyl alcohol solution used for field performance verifications. The solution is provided by and/or approved by ISPFS.

Recertification Class: A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months.

Waiting Period/Monitoring Period/Deprivation Period/Observation Period: 15-minute period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual.

Breath Alcohol Standard Operating Procedure
List of Revisions

SOP Section	Topic	Date of Revision
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
2	More than three calibration solutions	October 8, 1996
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999
2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999

1.2, 2.1, 2.2	Alco-Sensor and Intoxilyzer 5000 calibration checks	August 1, 1999
3	Deleted sections on blood and urine samples for alcohol determination	August 1, 1999
1.6	Operator certification record management	January 29, 2001
1,2, and 3	Reformat numbering	
2.1, 2.2	Requirement for running 0.20 simulator solution	August 18, 2006
2.2.1.1.2.2	Changed 3-sample to "two print cards".	November 27, 2006
2.2.1.1.2.2	Deleted "simulator port" and "two print cards".	May 14, 2007
2.1.2.1 and 2.2.4	Simulator temperature changed from "should" to "must".	May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007
1.2	Added the Lifeloc FC20	February 13, 2008
1.5	Deleted requirement that the new instrument utilize the same technology if the BTS is currently certified	February 13, 2008
2	Modified the accepted range for simulator solutions to +/- 10%, eliminating the +/- 0.01 provision. Added "Established target values may be different from those shown on the bottle label"	February 13, 2008
2.2	Added Lifeloc FC20 calibration checks Intoxilyzer 5000 calibration is now section 2.3	February 13, 2008
2.	Modified to specifically allow use of the 0.20 during subject testing	February 13, 2008
Sections 1, 2, 3	General reformat for clarification. Combined Alcosensor and Lifeloc sections. Specifically, changed calibration requirement using the 0.20 reference solution from four (4) checks to two (2).	December 1, 2008
2.1.4, 2.2.3, 2.2.4, 2.2.5 And 2.2.10	Clarification: a "calibration check" consists of a pair of samples in sequence and both samples must be within the acceptable range before proceeding with subject testing. A 0.20 solution should be replaced every 20-25 samples. Clarified the correct procedure for performing a calibration check.	January 14, 2009
2.1.3, 2.1.4.1, 2.1.9	Clarification: Added "*before and after*" to the 0.080 and 0.200 calibration checks, within 24 hours of a subject test. The official time and date of the calibration check is the time and date recorded on the printout, *or the time and date recorded in the log, whichever corresponds to the calibration check referenced in section 2.1.3 or 2.1.4.1.*	July 7, 2009

History Page

Revision #	Effective date	History
0	8/20/2010	The entire SOP was rewritten to incorporate language changes regarding performance verifications, and to clear-up ambiguities associated with the 0.20 verification and the relevance to cases not involving an 18-8004c charge. Scope and safety sections were added. Troubleshooting, MIP/MIC sections added.

Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments

Contents:

1 *Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments.*

2 Scope

This method describes the Idaho State Police Forensic Services (ISPFS) procedure, for use by agencies external to ISPFS, for the analysis of breath for the presence of volatile compounds using an approved breath testing instrument. This method provides for the quantitative analysis of ethanol.

Following all the recommendations of this external procedure will establish the scientific validity and set the unquestioned foundational admissibility of the breath alcohol test. Failure to meet all of the recommendations within this procedure does not disqualify the breath alcohol test, but does allow for the questioning of the breath alcohol tests as it pertains to its foundation of admissibility in court. That foundation can be set, through testimony, by a breath testing specialist expert or ISPFS expert in breath testing as to the potential ramifications of the deviation from the procedure as stated.

3 Safety

Within the discipline of breath alcohol testing, the general biohazard safety precaustions should be followed. This is due to the potential infectious materials that may be ejected from the mouth during the sampling of the breath. Caution should be taken so as the expired breath is not directed towards the officer or other unrelated bystander.

4 Instrument and Operator Certification

To ensure that minimum standards are met, individual breath testing instruments, operators, and breath testing specialists (BTS) must be approved and certified by the Idaho State Police Forensic Services (ISPFS). The ISPFS will establish and maintain a list of approved instruments by manufacturer brand or model designation for use in the state.

4.1 **Approval of Breath Testing Instruments.** In order to be approved and certified each instrument must meet the following criteria:

4.1.1 The instrument shall analyze a reference sample or analytical test standard, the results of which must agree within +/- 10% of the target value or such limits set by ISPFS.

4.1.2 The certification procedures shall be adequate and appropriate for the analyses of breath specimens for the determination of alcohol concentration for law enforcement.

4.1.3 Any other tests deemed necessary to correctly and adequately evaluate the instrument to give accurate results in routine breath alcohol testing.

4.2 The ISPFS may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.

4.3 **Operators** become certified by completing a training class taught by an ISPFS certified Breath Testing Specialist (BTS). Certification is for 26 calendar months and expires the last day of the 26th month. Certification will allow the operator to perform all functions required to obtain a valid breath alcohol test. It is the responsibility of the individual operator to maintain their current certification; the ISPFS will not notify operators that their certification is about to expire.

4.3.1 Recertification for another 26-month period is achieved by completing an ISPFS approved Operator class prior to the end of the 26th month.

4.3.2 If the individual fails to satisfactorily complete the class (including the written and practical tests), or allows their certification status to expire, he/she must retake the operator class in order to become re-certified.

4.3.3 If current Operator certification is voided, the individual is not certified to run evidentiary breath alcohol tests on the instrument in question until the operator class is completed.

4.3.3.1 There are no grace periods or provisions for extension of operator certification.

4.4 **Breath Testing Specialists (BTS)** are **Operators** who have completed an advanced training class and are ISPFS-certified to perform instrument maintenance, and provide both initial and recertification training for instrument operators.

4.4.1 To obtain **initial** BTS certification, an individual must be currently certified as an Operator of that particular instrument. BTS certification is then obtained by completing an approved BTS training class.

4.4.2 Certification is valid for 26 calendar months.

4.4.3 If BTS certification is allowed to expire, the individual reverts to certified Operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS specific duties relating to that particular instrument.

4.4.4 BTS certification is renewable by attending an approved BTS training class.

4.4.5 The Idaho State Police Forensic Services may revoke BTS certification for cause. Examples may include falsification of records, failure to perform required performance verification, failure to successfully pass a BTS re-certification class and failure to meet standards in conducting operator training.

4.5 **Adoption of a new instrument** by an agency will require updating any BTS and Operators in that agency in the use of the new instrument.

4.5.1 A currently certified **BTS** may become a certified BTS for a new instrument by completing an ISPFS approved BTS Instrumentation class.

4.5.2 A currently certified **Operator** may certify on a new instrument by completing an ISPFS approved Operator Instrumentation Class for the new instrument.

4.5.3 Individuals not currently certified as **Operators** must complete an Operator Class for each approved instrument.

4.6 **Record maintenance and management.** It is the responsibility of each individual agency to store performance verification records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of operator certification.

4.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.

4.6.1.1 Records may be subject to periodic review by the Idaho State Police Forensic Services.

4.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by ISPFS.

5. Performance Verification of Breath Testing Instruments

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the verification and includes the acceptable values on the Certificate of Analysis for each solution. Note: The ISP established target values may be different from those shown on the bottle label.

5.1 Alco-Sensor and Lifeloc FC20 – Portable Breath Testing Instrument Performance Verification

5.1.1 The Alco-Sensor and Lifeloc FC20 portable breath testing instrument performance verification is run using approximately **0.08** and/or **0.20** performance verification solutions provided by and/or approved by ISPFS.

5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples separated by air blanks.

5.1.3 A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification.

5.1.3.1 A 0.08 performance verification solution should be replaced with fresh solution approximately every 25 verifications or every calendar month, whichever comes first.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications.

NOTE: The 0.020 performance verification was implemented for the sole purpose of supporting the instruments results for an 18-8004c charge. In the absence of an 18-8004c charge, the 0.20 verifications, or lack thereof, shall have no relevance to the results or the evidentiary value of the evidentiary test.

5.1.4.1 The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test. The 0.20 performance verification solution should not be used routinely for this purpose.

5.1.5 Acceptable results for a 0.080 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

> **NOTE:** Due to external factors associated with changing a performance verification solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three runs for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. The suggested troubleshooting procedure should be followed if the initial performance verification does not meet the acceptance criteria.

5.1.6 Temperature of the simulator must be between **33.5°C** and **34.5°C** in order for the performance verification results to be valid.

NOTE: The simulator may need to warm for approximately 15 minutes to insure that the metal lid is also warm. If the lid is cold, condensation of alcohol vapor may occur producing low results.

5.1.7 Performance verification solutions should only be used prior to the expiration date on the label.

5.1.8 An agency may run additional performance verification solution levels at their discretion.

5.1.9 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log, whichever corresponds to the performance verification referenced in section 5.1.3 or 5.1.4.1.

5.2 Intoxilyzer 5000/EN Performance Verification

Intoxilyzer 5000/EN instruments must have a performance verification with each evidentiary test. If the performance verification is within the acceptable range for the lot of solution being used, then the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use.

5.2.1 Intoxilyzer 5000/EN performance verification is run using 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.

5.2.2 During each evidentiary breath alcohol test using the Intoxilyzer 5000/EN, a performance verification will be performed as directed by the instrument testing sequence and recorded as SIM CHK on the printout. If the SIM CHK is not within the acceptable range for the solution lot being used, the testing sequence will abort and no breath samples will be obtained.

5.2.3 A two sample performance verification using a **0.08 performance verification solution** should be run and results logged each time a solution is replaced with fresh solution. A 0.08 performance verification solution should be replaced with fresh solution approximately every 100 samples or every calendar month, whichever comes first.

5.2.4 A two sample performance verification using a **0.20 performance verification solution** should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 samples. The same bottle of 0.20 solution may be used for several months.

> **NOTE:** The 0.020 performance verification was implemented for the sole purpose of supporting the instruments results for a 18-8004c charge. In the absence of an 18-8004c charge, the 0.20 verification, or lack thereof, shall have no relevance to the results or the evidentiary value of the evidentiary test.

5.2.5 Acceptable results for a 0.080 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results for each solution lot series are included in a certificate of analysis, prepared by, and available from, the ISPFS.

> **NOTE:** Due to external factors associated with changing a performance verification solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained however, if results after a total of three runs for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. Follow the suggested troubleshooting procedure if the initial performance verification does not meet the acceptance criteria.

5.2.6 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log.

5.2.7 Performance verification solutions should only be used prior to the expiration date as marked on the label.

5.2.8 Temperature of the simulator must be between **33.5°C** and **34.5°C** in order for the performance verification results to be valid.

5.2.9 An agency may run additional performance verification solution levels at their discretion.

5.2.10 The BTS must set the correct acceptable range limits and performance verification solution lot number in the instrument before proceeding with evidentiary testing.

6. Evidentiary Testing Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

6.1 Prior to evidential breath alcohol testing, the subject/individual should be monitored for at least fifteen (15) minutes. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period. During the monitoring period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate.

NOTE: If a foreign object/material is left in the mouth during the entirety of the 15 minute monitoring period, any potential external alcohol contamination will come into equilibrium with the subject/individual's body water and/or dissipate so as not to interfere with the results of the subsequent breath alcohol test.

6.1.1 The breath alcohol test must be administered by an operator currently certified in the use of the instrument used.

6.1.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.

6.1.3 The operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.

6.1.4 During the monitoring period, the operator must be alert for any event that might influence the accuracy of the breath alcohol test.

6.1.4.1 The operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the operator should begin another 15-minute waiting period before repeating the testing sequence.

6.1.4.2 If, during the 15-minute waiting period, the subject/individual vomits or regurgitates material from the stomach into the subject/individual's breath pathway, the 15-minute waiting period must begin again.

6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2.

6.2 **A complete breath alcohol test includes two (2)** valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart to allow for the dissipation of potential mouth alcohol contamination.

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample.

6.2.1 If the subject/individual fails or refuses to provide a second or third adequate sample as requested by the operator, the single test result may be considered **valid**.

6.2.1.1 The operator may repeat the testing sequence as required by circumstances.

6.2.1.2 The operator should use a **new mouthpiece** for each series of tests.

6.2.2 A third breath sample is required if the first two results differ by more than 0.02.

6.2.2.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15-minute waiting period to obtain a third breath sample.

6.2.2.2 The results for a duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

6.2.3 The operator should log test results and retain printouts for possible use in court. The log of the results or the instrument printouts can be used as the official legal record for court purposes.

6.2.4 If a subject/individual fails or refuses to provide a second or third sample as requested by the operator, the results obtained are still considered valid

by the ISPFS, **provided** the failure to supply the requested samples was the fault of the subject/individual and not the operator.

6.2.5 If the second or third samples are lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

7. Troubleshooting Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

7.1 Performance verification: If, when performing the periodic performance verification, the instrument falls outside the limits of the verification, the troubleshooting guide should be used.

NOTE: This is a guide for troubleshooting failed performance verifications and the procedure is recommended to streamline and isolate the potential cause of the problem. Strict adherence to the guidelines is not required.

7.1.1 The three sources of error when performing the periodic performance verifications are in the simulator setup and operator technique, the simulator performance verification solution, and the instrument calibration itself.

7.1.2 If the first performance verification fails, the simulator setup and technique of the operator performing the verification should be evaluated. The simulator should be evaluated to ensure that it is hooked up properly, uses short hoses, is properly warmed, is within temperature, the operator blow technique is not too hard or soft, and that the operator does not stop blowing until after the sample is taken.

7.1.2.1 The performance verification should be run a second time

7.1.2.2 If the performance verification passes on the second try, the instrument passes the performance verification.

7.1.3 If the second performance verification fails, then the performance verification solution should be evaluated.

7.1.3.1 The performance verification solution should be changed to a fresh solution.

7.1.3.2 The solution should be warmed for approximately 15 minutes, or until the temperature is within range, and the simulator lid is as warm as the simulator jar.

7.1.3.3 The performance verification may then be repeated.

7.1.4 If the third performance verification fails, then the only remaining source of error lies with the instrument itself. At this point the instrument must be taken out of service and sent to ISPFS or an approved service provider.

7.1.5 Upon return from service, the instrument should be evaluated by ISPFS before being put back into service.

7.2 Thermometers:

7.2.1 If a bubble forms in the thermometer, the operator or BTS can place the thermometer in a freezer to draw the mercury (or equivalent) into the bulb of the thermometer. This should disperse the bubble.

8. MIP/MIC Procedure

Since the testing threshold (presence or absence) for a minor in possession/minor in consumption charge is different from an 18-8004 charge and the numeric thresholds, there is a different procedure associated with these special circumstances. In many instances, an underage drinking party may consist of multiple subjects/individuals that need to be tested and the sheer number of individuals does not lend itself to observing a 15 minute waiting period for each person. The potential for "mouth alcohol" is still a factor and should be addressed in the testing sequence.

8.1 15 minute observation period: At the officer's discretion, or as the circumstances dictate, the regular DUI procedure (Section 6) may be followed in order to obtain a breath sample from the subject/individual. Otherwise, a shortened procedure can be followed

8.2 MIP/MIC procedure:

8.2.1 The breath alcohol test must be administered by an operator currently certified in the use of the instrument used.

8.2.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.

8.3 **A complete breath alcohol test includes two (2)** valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart to allow for the dissipation of potential mouth alcohol contamination.

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample.

8.3.1 If the subject/individual fails or refuses to provide a second or third adequate sample as requested by the operator, the single test result may be considered **valid.**

8.3.1.1 The operator may repeat the testing sequence as required by circumstances.

8.3.1.2 The operator should use a **new mouthpiece** for each series of tests.

8.3.2 A third breath sample is required if the first two results differ by more than 0.02.

8.3.2.1 The results for a duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individuals breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

8.3.3 The operator should log test results and retain printouts for possible use in court. The log of the results or the instrument printouts can be used as the official legal record for court purposes.

8.3.4 If a subject/individual fails or refuses to provide a second or third sample as requested by the operator, the results obtained are still considered valid by the ISPFS, **provided** the failure to supply the requested samples was the fault of the subject/individual and not the operator.

8.3.5 If the second or third samples are lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

EXHIBIT B

In the Matter of the Driving Privileges of Thomas Raymond Wagner Jr. The DUI charge was on August 15, 2003. The hearing was on September 11, 2003. The decision was reached on September 29, 2003. The Order notes that the period of suspension began on September 15, 2003. R. at p. 609.

In the Matter of the Driving Privileges of Douglas Eugene McCane. The matter was heard on August 23, 2003. The hearing officer vacated the license suspension on November 19, 2003, because the recording device failed to work during the ALS hearing. R. at p. 613.

In the Matter of the Driving Privileges of Joseph Edward Sparks. The DUI contact was on August 12, 2003. The hearing was on August 28, 2003. The decision was reached on November 20, 2003, with the Order saying that the hearing officer's decision is dated November 20, 2003, and the order notes that the 90 day suspension commenced September 11, 2003. R. at p. 634.

In the Matter of the Driving Privileges of Anthony Cole Seitsinger. The breath tests/DUI stop was on January 10, 2004. The ALS hearing was held on February 3, 2004. The Order was entered, vacating the license suspension, on February 20, 2004, which would have been 11 days after the temporary driving privileges would have ended. R. at p. 643.

In the Matter of the Driving Privileges of Dennis Joseph Schaff. The hearing was held on December 18, 2004. The decision was vacated on January 5, 2005. R. at p. 650.

In the Matter of the Driving Privileges of Ronald Lee Paffile. Mr. Paffile was stopped for DUI on March 4, 2005. The hearing was held on March 29, 2005. The hearing officer vacated the license suspension on May 17, 2005. R. at p. 659.

In the Matter of the Driving Privileges of Jeanna Marie Wakefield. The DUI stop occurred on December 2, 2005. The hearing was held on January 5, 2006. The hearing officer issued his decision on February 22, 2006. In this case, the hearing officer had granted a stay, but it was three

days after the license suspension took effect. R. at p. 675.

In the Matter of the Driving Privileges of Amanda Marie White. Ms. White was arrested on November 19, 2005. The hearing was held on December 22, 2005. Her license suspension was vacated on January 27, 2006. R. at p. 685.

In the Matter of the Driving Privileges of Tyson J. Kernan. Mr. Kernan was arrested on January 18, 2009. Mr. Kernan had his telephone hearing on February 9, 2009. The hearing officer issued his decision on February 23, 2009, noting that the license suspension began on February 17, 2009. R. at p. 694.

In the Matter of the Driving Privileges of Darryl Dwayne Lewis. Mr. Lewis was stopped on his DUI on July 31, 2001. His telephone hearing was on August 20, 2001. His license suspension was vacated on September 24, 2001. R. at p. 699.

In the Matter of the Driving Privileges of Suzanne McAtty. Mr. McAtty was stopped on January 24, 2002. Ms. McAtty had her ALS telephone hearing on February 19, 2002. The hearing officer vacated the license suspension on March 26, 2002. R. at p. 710.

In the Matter of the Driving Privileges of Erik Bunkers. Mr. Bunkers had his telephone hearing on March 18, 2002. His license suspension was vacated on April 8, 2002. R. at p. 717.

In the Matter of the Driving Privileges of Stacy Clint Lunders. The licence suspension hearing was on March 25, 2002. The license suspension was vacated on April 25, 2002. R. at p. 722.

In the Matter of the Driving Privileges of Arthur Eugene Kiele. Mr. Kiele was stopped on August 18, 2002. He had has hearing on September 12, 2002. His license suspension was vacated on September 19, 2002. R. at p. 731.

In the Matter of the Driving Privileges of Roy Gordon Bradley. Mr. Bradley was stopped for

DUI on August 14, 2002. He had his hearing on September 6, 2002. The decision was reached on November 1, 2002, to sustain the license suspension. The Order noted that the suspension would begin September 13, 2002. R. at p. 748.